IN THE

Supreme Court of the United States

October Term, 1962

No. 464

UNITED STATES OF AMERICA,

Petitioner,

v.

CARLOS MUNIZ AND HENRY WINSTON

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT HENRY WINSTON

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Statutes Involved

The pertinent provisions of the Federal Tort Claims Act as amended, 28 U. S. C. 1346(b), 2674 and 2680, and of the Criminal Code, 18 U. S. C. 4005 and 4042, are set forth in the Appendix to this brief.

Question Presented

The question presented in the case of respondent Henry Winston is: Whether the Federal Tort Claims Act authorizes recovery for personal injuries sustained by a federal prisoner in consequence of the negligent or wilful failure of federal prison personnel to provide the prisoner with timely medical attention and to use reasonable care and skill in the diagnosis and treatment of his physical condition.

Statement of the Case

The action of Henry Winston, seeks damages under the Tort Claims Act (herein called the Act) for blindness and other disabilities which he sustained while confined to the federal penitentiary at Terre Haute, Indiana, because of the negligent and wilful failure of the prison personnel to provide him with timely medical attention and to use reasonable care and skill in the diagnosis and treatment of a brain tumor (R. 1-3).[1]

The District Court dismissed the complaint, holding that the Act does not authorize recovery for injuries sustained by federal prisoners (R. 3). The judgment was reversed by a panel of the court below and thereafter by the court en banc (R. 4-10, 24-40). The court took similar action on the appeal of respondent Carlos Muniz from the judgment dismissing his complaint which seeks damages under the Act for prison-incurred injuries (R. 68-70, 74-75). The government consolidated the two cases when it petitioned for certiorari.

Summary of Argument

I. The Act and the legislative history establish that Winston's claim for personal injuries sustained by him while a federal prisoner because of the negligent and wrongful conduct of prison personnel is not excluded from coverage.

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[1] Winston had been sentenced to imprisonment for five years for conspiracy to violate the Smith Act and to a consecutive term of three years for contempt in failing to surrender for service of the five year sentence. See *Dennis* v. *United States*, 341 U. S. 494, and *Green* v. *United States*, 356 U. S. 165. The injuries complained of in the present suit were sustained in 1959-60 while he was serving the contempt sentence (R. 2). The complaint was filed in November, 1960 (R. 1), during his confinement. He was released on July 3, 1961 when his sentence was commuted to time served.

A. The complaint alleges conduct by prison personnel which violated the statutory duty of the Bureau of Prisons to provide for the care, protection and safekeeping of prisoners. Winston's claim is therefore within the terms of the Act imposing liability on the United States for negligent or wrongful conduct of its employees acting within the scope of their employment.

Since claims for injuries to prisoners are not among the classes of claims expressly exempted from coverage, it appears from the principle of *expressio unius* that Congress intended them to be covered.

The provision of the Act that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances" does not limit coverage to governmental activities which are likewise performed by private persons. It is sufficient that the conduct complained of is of a kind which, if privately engaged in, would subject the person who engaged in it to liability under the general tort law principles of the law of the state where the conduct occurred. Winston's complaint satisfies this test since negligence by private hospitals and malpractice by private doctors are actionable in Indiana.

The complaint makes out a stronger case for liability than that presented in *Indian Towing Co.* v. *United States* or *Rayonier, Inc.* v. *United States*, because Indiana imposes liability on jailers for the identical conduct complained of and because such conduct is violative of duties expressly imposed by a federal statute.

B. The legislative history confirms the interpretation of the Act established by its text.

The House and Senate Reports on the bill which became the Act show that Congress intended the exemptions from liability enumerated in section 2680 to be exclusive. Three additional items of the legislative history demonstrate

that the omission from these exemptions of claims for prison-incurred injuries was deliberate. First, Congress was aware of the prevalence of such claims from the introduction of numerous private bills to compensate for injuries to prisoners. Second, six tort claims bills antecedent to the Act contained specific exemptions relating to the claims of prisoners. Finally, the House Report on the bill that became the Act shows that Congress, in writing the Act, gave consideration to the effect of, and followed the approach of, the New York statute waiving the state's immunity from tort liability. Since the state courts had construed this statute as embracing claims for prison-incurred injuries, the presumption is that Congress intended the same construction to apply to the Act.

This presumption is not weakened by the reference in the House Report to the statutes of California and Arizona under which prisoner-claims are not allowed. Their disallowance results from the fact that these state statutes do not waive immunity from tort liability but merely provide an additional remedy for the enforcement of existing forms of liability. The difference in the effect of a California-Arizona type of statute, on the one hand, and a New York type, on the other, is illustrated by the experience in Illinois, the fourth state to which the House Report made reference. The Illinois courts denied recovery on prisoner-claims under a 1917 statute which merely recognized claims which the state should in equity and good conscience pay. However, when the statute was amended in 1945 by waiving the state's immunity from tort liability, the amended statute was held to cover the claims of prisoners.

The government brushes aside the indicia of congressional intent which appear on the face of the Act and ignores the legislative history altogether. It argues that 18 U. S. C. 4126, authorizing compensation for occupational injuries to certain prisoners, indicates that Congress did not intend prisoner-claims to be covered by the Act. How-

ever, as the House and Senate Reports on the bill that became the Act show, Congress specifically exempted from coverage those governmental activities for which adequate remedies were already available. Moreover, the Court has held that recovery is not precluded under the Act because another system of compensation is available.

The government also alludes to the fact that, subsequent to the Act, Congress has passed private bills to compensate for prison-incurred injuries. But there is no indication in this legislation that Congress concurs in a construction of the Act denying coverage for such injuries. Moreover, the views of a later Congress as to the intent of the Congress which passed the Act would have little significance.

II. The decision in *Feres* v. *United States* is inapplicable. Neither of the grounds which the opinion assigns in denying recovery for injuries sustained by servicemen while on active duty applies to prisoners.

1. *Feres* found that the system of compensation provided for servicemen under other federal statutes was "comprehensive," "certain and uniform," and "not negligible or niggardly." It held that Congress intended this system to exclude the remedy under the Act, based as the latter is on the law of the place where the tort is committed.

There is, however, no compensation system for prisoners which resembles that for servicemen. The scheme authorized by 18 U. S. C. 4126 is examined and found to be neither "comprehensive" nor "certain and uniform," and to provide compensation which is "niggardly." Moreover, this ground for the decision in *Feres* has been weakened if not overruled by *United States* v. *Brown*. Finally, prior to enactment of the Act, the parallel New York statute had been construed to exclude the claims of militiamen on the ground that they were provided for by a comprehensive state compensation system. Thus, the legislative history

supports the result in *Feres* just as it supports a contrary result in the present case.

2. The second ground for the result in *Feres* was the lack of any "parallel liability," since recovery by a serviceman or state militiaman either from the government or from his superior officers is completely unprecedented.

In the present case, however, there is ample evidence of the "parallel liability" found wanting in *Feres*. In the three states—New York, Illinois and North Carolina—having statutes waiving tort immunity under which claims for prison-incurred injuries have been presented, the claims have been allowed. Elsewhere, governmental bodies have been held liable for injuries to prisoners in the absence of statutes waiving immunity. Furthermore, most jurisdictions permit recovery by prisoners in actions against the jailers themselves.

Additionally, the holding in *Feres* that recovery under the Act is dependent on the existence of parallel private or governmental liability appears to have been overruled by *Indian Towing Co.* v. *United States* and *Rayonier, Inc.* v. *United States*. Even as to servicemen, the Court has confined the ruling in *Feres* to the facts of that case. And the decisions denying recovery to prisoners on the authority of *Feres* have been criticized by the author of the textbook on the Act and by law review commentators.

III. The policy considerations advanced by the government are without substance and, in any event, cannot alter the construction of the Act established by its text and the legislative history.

The burden of overcoming the terms of a statute by what are thought to be the consequences of a literal interpretation is a heavy one. The government bears an even heavier burden in this case because, as the House and Senate Reports show, its judgment as to the wisdom of allowing prisoner-claims is contrary to the judgment of Congress when it passed the Act.

It may be, as the government argues, that implicit in the decision in *Feres* was the belief that the consequences of allowing the claims of servicemen were so "outlandish" that they could not have been intended by Congress. Prisoner-claims, however, are of a different order. The differences are high-lighted by 18 U. S. C. 4042 making it the duty of the Bureau of Prisons to provide for the care, safekeeping and protection of prisoners. Since there is nothing outlandish about this duty, there is nothing outlandish about providing prisoners with a remedy for its breach. Moreover, in view of the imposing body of law which permits recovery on claims for prison-incurred injuries, it cannot be seriously argued that allowance of such claims under the Act would be outlandish.

The dire results which the government supposes will flow from the allowance of prisoner claims appear, on examination, to be highly exaggerated, largely imaginary, and contrary to all of the relevant experience.

A. The argument that to allow prisoner-claims would undermine discipline and jeopardize the success of the penal system is based on supposition. Yet, for many years, most jurisdictions have allowed recovery in suits against jailers, and recovery from the state is authorized in New York, Illinois and North Carolina. Thus a practice, which the government urges would create havoc in any prison system, has not caused even a ripple in penological circles in all the years that it has prevailed on a state level. Moreover, the problems of prison administration are not significantly different from those encountered by private hospitals for mental disease, drug addiction or alcoholism. Yet, these institutions are held accountable for their negligence. Similarly, claims have been allowed under the Act for injuries to mental patients in government hospitals. And it appears to have been conceded that the Act covers the Public Health Service Hospital for narcotic addicts in its relations with patients who are not also prisoners.

Far from impairing prison discipline, affirmance of the decision below may well improve it by administering a healthy corrective to the callous attitudes of prison personnel exemplified in the present case.

B. The Government asserts that allowance of prisoner-claims would undermine the uniformity and federal character of the prison system. But similar considerations have not barred the claims of veterans for injuries incident to their confinement in Veterans' Administration facilities. Such lack of uniformity as there may be in the ajudication of claims under the Act is the result of Congress' deliberate decision to make state laws controlling. Moreover, lack of uniformity, from state to state, in the operations of an agency of the national government is inevitable under our federal system.

The statement in *Feres* that the tort claim of a soldier should not be governed by the law of a place where he never elected to be was made in support of a holding that the uniform compensation system for servicemen is exclusive. It has no application to prisoner-claims for which the Act provides the only remedy.

In conclusion, the government's argument for reading an exception into the Act contravenes the principles established by the Court for construing the Act. Furthermore, the argument for a judge-made exception is an anomaly at a time when judicial impatience with the doctrine of sovereign immunity has led to its abrogation by judicial decision in state after state.

ARGUMENT

1. The text of the Act and the legislative history establish that Winston's claim for personal injuries sustained by him while a federal prisoner because of the negligent and wrongful conduct of prison personnel is not excluded from coverage.

A. The interpretation of the Act from its text.

The Act imposes liability on the United States for negligent or wrongful conduct of its employees, acting within the scope of their employment, in cases where a private individual in like circumstances would be liable under the law of the place where the conduct occurred, 18 U. S. C. 1346, 2674.

It is the duty of the Bureau of Prisons to "provide for the safekeeping, care and * * * protection" of federal prisoners. 18 U. S. C. 4042. The federal prisons are furnished with medical service by officers of the Public Health Service detailed to the Department of Justice. 18 U. S. C. 4005. The complaint (R. 1-3) charges negligent and wrongful conduct by the medical and other personnel of the Terre Haute penitentiary while acting within the scope of their employment under these statutes and in violation of the statutory duty of safekeeping, care and protection.

The Act enumerates thirteen classes of claims which are excluded from coverage. 28 U. S. C. 2680. Claims for injuries to prisoners are not among the excepted classes. On the principle of *expressio unius*, therefore, it appears that Congress intended the United States to be liable on such claims.

Claims for prison-incurred injuries are not excluded by the provision of section 2674 providing for liability "in the same manner and to the same extent as a private individual under like circumstances." Normally, of course, prisons are operated by governments, not by private per-

sons.[1a] But the fact that the confinement of prisoners may be a uniquely governmental function does not exempt the United States from liability under the Act.

The Act "is not self-defeating by covertly imbedding the casuistries of municipal liability for torts." *Indian Towing Company* v. *United States*, 350 U. S. 61, 65. That case rejected the argument that the references in sections 1346 and 2674 to the liability of private persons exclude governmental liability for negligence in the conduct of activities which private persons do not perform. The Court stated (p. 67) that, "we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." Accordingly, it held the government liable for Coast Guard negligence in operating a lighthouse on the ground (p. 64) that, "it is hornbook law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."

Similarly, *Rayonier* v. *United States*, 352 U. S. 315, permitted recovery for the negligence of the Forest Service in fighting a fire.[2] As stated in *Rayonier* (p. 319), "the test established by the Tort Claims Act for determining United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occur."

Thus, *Indian Towing* and *Rayonier* held it irrelevant to recovery under the Act that there was no applicable state law under which lighthousekeepers or firefighters were liable for their negligence. Instead, liability of the United

[1a] This is not always so, at least in the case of youthful offenders. See *Paige* v. *State*, 269 N. Y. 352, 199 N. E. 617; *Corbett* v. *St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997.

[2] The case (p. 319) overruled the holding in *Dalehite* v. *United States*, 346 U. S. 15, that claims for negligence for firefighting are not actionable under the Act.

States was predicated on the fact that the conduct complained of was of a kind which, if privately engaged in, would subject the person who engaged in it to liability under the general tort law principles of the applicable state law.

Winston's complaint satisfies this test. Negligence by private hospitals and malpractice by private doctors are both actionable in Indiana where the conduct complained of occurred (R. 2). See *e. g., Fowler* v. *Norways Sanatorium*, 112 Ind. App. 347, 42 N. E. 2d 415; *Worster* v. *Caylor*, 231 Ind. 625, 110 N. E. 2d 337.

Indeed, in two respects, the complaint makes out a stronger case for liability under the Act than that presented in *Indian Towing* or *Rayonier*. First, Indiana imposes private liability for the identical conduct complained of here. It permits recovery from a jailer for injuries to a prisoner resulting from the negligence of the former, including negligent failure to provide medical attention. *Magenheimer* v. *State*, 126 Ind. App. 128, 90 N. E. 2d 813; *Ex Parte Jenkins*, 25 Ind. App. 532, 58 N. E. 560; *Indiana ex rel. Tyler* v. *Gobin*, 94 F. 48 (C. C. Ind.). Second, unlike the situation in *Indian Towing* and *Rayonier*, the conduct of the government employees alleged in the present complaint violated duties expressly imposed upon them by statute. 18 U. S. C. 4042.

It is indisputable, therefore, that Winston's complaint states a claim within the coverage of the Act as written.

B. The legislative history.

The legislative history confirms the interpretation appearing from the face of the Act that prisoners' claims are covered. It shows, in the first place, that Congress intended the exceptions from liability enumerated in section 2680 to be exclusive. The House and Senate Reports on the bill

which became the Act (herein called the House Report and the Senate Report) both state:

> "The present bill would establish a uniform system * * * permitting suit to be brought on *any* tort claim * * * with the exception of certain classes of torts expressly exempted from operation of the Act." H. Rep. No. 1287, 79th Cong., 1st Sess., p. 3; S. Rep. No. 1400, 79th Cong., 2d Sess., p. 31; emphasis supplied.

Both reports further state:

> "The other exemptions in section 402 [28 U. S. C. 2680][3] relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available." H. Rep., p. 6; S. Rep., p. 33.

It is plain from these statements and from the fact that the Act was the product of almost thirty years of congressional deliberation [4] that thoroughgoing consideration was given to the governmental activities which should be exempted from coverage. Three additional items of the legislative history demonstrate that the omission of claims for prison-incurred injuries from these exemptions was deliberate.

First, at least twenty-one private bills providing compensation for injuries to prisoners were passed by Congress between 1935 and 1946, the date of the Act.[5] During the same period, only about fifteen per cent of all private bills introduced were passed. Hearings before Committee on the Judiciary, H.R., 77th Cong., 2d Sess. on H.R. 5373 and H.R. 6463, p. 25. Thus, many more than twenty-one bills

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[3] Other than the discretionary function exemptions of section 2680(a).

[4] *Indian Towing Co.* v. *United States*, *supra*, at 68.

[5] The citations are given in the government's brief, p. 14, n. 2.

for the relief of prisoners must have been introduced and referred to committee in the eleven years preceding enactment of the Act. One of the twenty-one bills acted upon[6] was passed only a few days before passage of the Act. It is obvious from these facts that Congress was aware of the prevalence of claims for prison-incurred injuries when it wrote and passed the Act. The omission of such claims from the Act's exemptions cannot, therefore, be attributed to oversight.

Any possible doubt on that score is dispelled by the fact that six tort claims bills antecedent to the Act contained specific exceptions relating to the claims of prisoners.[7] A bill favorably reported to the House in 1931 excluded the prosecution of claims by prisoners during the period of their confinement.[8] Five other bills introduced between 1931 and 1935, one of which was favorably reported to the Senate, excepted all claims for prison-incurred injuries.[9]

Finally, the legislative history shows that Congress was familiar with and gave consideration to the effect of the New York Court of Claims Act waiving the state's

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[6] Act of July 25, 1946, 60 Stat. 1264.

[7] The dissent below erroneously stated that there were no such antecedent bills (R. 55).

[8] H. R. 17168 and H. Rep. No. 2800, 71st Cong., 3d Sess. The bill provided: "Sec. 207. The provisions of this title shall not apply to— * * * (c) Any claim by a prisoner while in a Federal penal institution."

[9] See S. 4567 and Sen. Rep. No. 658, 72nd Cong., 1st Sess., 1932. The bill provided: "Sec. 206. The provisions of this Act shall not apply to— * * * (11) Any claim for injury to or death of a prisoner." Each of the following bills likewise contained this provision: H. R. 5065 and S. 211, 72d Cong., 1st Sess. (1931); S. 1833, 73rd Cong., 1st Sess. (1933), and S. 1043, 74th Cong., 1st Sess. (1935).

immunity from tort liability. The House Report stated (p. 3):

> "It is pertinent to note in this connection that a number of the States have waived their governmental immunity against suit in respect to tort claims and permit suits in tort to be brought against themselves. Such legislation does not appear to have had any detrimental or undesirable effect. Thus, the State of New York, in 1929, by an act of its legislature explicitly waived its immunity from liability for the torts of its officers and employees and consented that its liability for such torts be determined in accordance with the same rules of law as apply to an action against an individual or a corporation. That State legislation went much further than the pending bill, because no exceptions to liability and no maximum limitation on amount of recovery was prescribed[10] (Laws of N. Y., 1929, ch. 467).[11]

Congress followed the pattern of the New York statute when it wrote the Act. Like the state legislature, it provided that governmental tort liability should be determined in accordance with the rules of law applicable to private

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[10] The House bill contained a provision limiting recovery to $10,000 which was deleted from the Act as passed.

[11] Chap. 467 added a new section to the Court of Claims Act as follows: "§ 12a. The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee [sic]." The substance of this provision now appears as section 8 of the Court of Claims Act.

persons. In 1945, the date of the House Report, it was well settled in New York that claims for prison-incurred injuries were cognizable under the state statute. E.g., *Paige* v. *State*, 269 N. Y. 352, 199 N. E. 617 (1936); *Sullivan* v. *State*, 12 N. Y. Supp. 2d 504, aff'd 281 N. Y. 718 (1939); *White* v. *State*, 23 N. Y. Supp. 2d 526, aff'd 285 N. Y. 728 (1940); *Kurz* v. *State*, 52 N. Y. Supp. 2d 7 (Ct. Cls., 1944).[12]

As the House Report shows, Congress had studied the New York statute and found that it did "not appear to have had any detrimental or undesirable effect." Congress must therefore have been aware of the New York decisions allowing claims for prison-incurred injuries. Yet it did not include such claims among those which the Act excepts from coverage. Under these circumstances, the presumption is that it adopted the New York construction which allowed such claims. *Yates* v. *United States*, 354 U. S. 298, 319; *James* v. *Appel*, 192 U. S. 129, 135; *Willis* v. *Eastern Trust and Banking Co.*, 169 U. S. 295, 307; *Joines* v. *Patterson*, 274 U. S. 544, 549. Cf. *Carolene Products Co.* v. *United States*, 323 U. S. 18, 26.

The dissenting opinion states (R. 58) that no significance can be attached to the reference in the House Report to the New York statute because the Report (p. 4) also cites California and Arizona statutes under which prisoners are not permitted to sue. Examination of the latter statutes, however, shows that the Report's reference to them strengthens the inference arising from its discussion of the New York law.

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[12] Because of New York's civil death statute (Penal Law § 510) a prisoner may not sue while incarcerated, but the statute of limitations is tolled for up to five years during incarceration (Civil Practice Act § 60). Cf. the provisions of H. R. 17168, 71st Cong., 3d Sess., *supra*, p. 13, n. 8.

Neither the California nor the Arizona statute waives the immunity of the state from tort liability.[13] The statements to the contrary in the dissenting opinion (R. 48, 58) are erroneous. It has been held that both statutes merely authorize lawsuits as an additional remedy for the enforcement of state liabilities that would have existed without the statutes. Accordingly, neither statute permits recovery from the state for the negligence of its employees, at least while performing a governmental function. *Denning* v. *State*, 123 Cal. 316, 55 P. 1000; *State* v. *Sharp*, 21 Ariz. 424, 189 P. 631. It is because the operation of a prison is a governmental function that California has held that claims for prison-incurred injuries are not covered by its statute. *Grove* v. *County of San Joaquin*, 156 Cal. App. 2d 808, 320 P. 2d 161.

The difference in the effect on claims for prison-incurred injuries of the California-Arizona type of statute, on the one hand, and the New York type, on the other, is well illustrated by the experience in Illinois, the fourth state to which the House Report made reference. As the House Report noted (p. 4), an Illinois statute adopted in 1917 conferred jurisdiction on the state Court of Claims to pass on all claims, in contract or tort, "which the State as a sovereign commonwealth should in equity and good conscience discharge and pay." Laws of Illinois, 1917, ch. 325. Under this statute, the state was not liable for the neg-

[13] The House Report (R. 56-57) cites California Statutes 1893, ch. 45, sec. 1, p. 57 which reads as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment." This provision now appears without material change as Government Code § 16041. The Arizona statute cited in the House Report (*ibid*), Arizona Laws of 1912, art. I, ch. 59, was a counterpart of the California statute. It appears without material change as Arizona Revised Statutes § 12-821.

ligence of its prison personnel since it was held, as in California, that operating a prison is a governmental function for which there was no liability. *Hewlett* v. *State*, 13 C. C. R. (Ill.) 27. In 1945, however, Illinois amended the statute by waiving the state's sovereign immunity from tort liability. Laws of Illinois, 1945, p. 60, Revised Statutes, 1961, § 439.8.[14] The amended statute has been held to cover the claims of prisoners, and the Illinois Court of Claims has frequently awarded damages under it for prison-incurred injuries. E.g., *Moore* v. *State*, 21 C. C. R. (Ill.) 282; *White* v. *State*, 21 C. C. R. (Ill.) 173; *Hroma* v. *State*, 21 C. C. R. (Ill.) 291; *Morris* v. *State*, 23 C. C. R. (Ill.) 91.

In framing the Act, Congress rejected the approach taken by the California, Arizona and 1917 Illinois statutes. It did not merely establish a new remedy for the enforcement of old liabilities. Instead, it adopted a New York type of statute which waives sovereign immunity and creates new governmental liabilities. In doing so, as we have shown, the presumption is that it also adopted the settled judicial construction of the New York statute, including the construction allowing prisoner claims.

This presumption accords with the interpretation of the Act which is established by its text and the entire legislative history. It is only by brushing aside the indicia of congressional intent which appear on the face of the Act,

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[14] The House Committee was evidently not aware of the amendment which was enacted at about the time the House Report was written. The statute as amended reads as follows: "The court [of claims] shall have jurisdiction to hear and determine the following matters: * * * D. All claims against the State for damages sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable * * * The defense that the State * * * is not liable for the negligence of its officers, agents and employees in the course of their employment shall not be applicable to the hearing and determination of such claims."

and by ignoring the legislative history altogether, that the government can blandly conclude (Br. 12) that, "The legislative context discloses no indication that Congress intended prisoners to be covered by the Tort Claims Act."

Two of the matters alluded to by the government (Br. 13) as "circumstances in the legislative context" merit brief comment.

First, it is urged (Br. 14-15, 16-17) that the existence when the Act was passed of an administrative compensation scheme under 18 U. S. C. 4126 for occupational injuries to prisoners employed in prison industry, and the subsequent extension of the scheme to prisoners engaged in maintenance work, militate against the conclusion that Congress intended prisoner-claims to be covered by the Act. However, as the House and Senate Reports stated (*supra*, p. 12), section 2680 specifically excepts from coverage those governmental activities "for which adequate remedies are available." It is evident, therefore, that Congress did not regard this limited compensation scheme (discussed in detail, *infra*, p. 21) as adequate, even for the claims which it covered. Otherwise, Congress would have included such claims among those enumerated in section 2680. Moreover, the Court has held that the availability of another and adequate system of compensation is not indicative of a legislative purpose to exclude recovery under the Act. *Brooks* v. *United States*, 337 U. S. 49, 53; *United States* v. *Brown*, 348 U. S. 110.

Second, the government contends (Br. 15-16) that the enactment subsequent to the Act of a number of private bills carrying compensation for prison-incurred injuries manifests a congressional judgment that claims for such injuries are not covered by the Act. But there is nothing in the legislation or the committee reports cited by the government (*ibid*, n. 5, n. 6) to show that Congress did anything more than accept the representation of the Department of Justice that claims for the injuries in question

are not covered by the Act. There is no indication that Congress gave independent consideration to the subject or agreed with the lower court decisions denying recovery on prisoner-claims. Even if such agreement had been unequivocally expressed, the view of a later Congress as to the interpretation of a statute adopted by an earlier one would have little significance. *Rainwater* v. *United States*, 356 U. S. 590, 593. See also *Johansen* v. *United States*, 343 U. S. 427. The less so here, where the text of the Act and its legislative history establish that the Congress which passed the Act intended a contrary interpretation.

II. The decision in *Feres* v. *United States* is inapplicable.

As the government states (Br. 10-11), the lower court decisions denying recovery under the Act for prison-incurred injuries were based on *Feres* v. *United States*, 340 U. S. 135. The dissenting opinions below (R. 10, 40) and the argument of the government here are likewise based on *Feres*. Indeed, if it were not for that case, no one could seriously contend that prisoner claims are excluded from the coverage of the Act.

Feres held that the Act does not cover injuries sustained by members of the armed forces, while on active duty, resulting from the negligence of other members of the armed forces. The Court stated (at 138) that, "We do not overlook considerations persuasive of liability in these cases," including the broad coverage of the Act when given a literal interpretation. The opinion assigns two reasons for the denial of liability despite these considerations.[15] Neither of these is applicable to claims for prison-incurred injuries.

[15] In the next point (*infra*, p. 27) we discuss other reasons, not stated in the opinion, to which the result in *Feres* has been ascribed.

1. The opinion observed (p. 140) that, "The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional." The opinion then found (at 144) that other federal statutes "provide systems of simple, certain and uniform compensation for injuries or death of those in the armed services." These statutes were described (at 140) as affording "a comprehensive system of relief" to servicemen and their dependents which (at 145) "is not negligible or niggardly." Stating (at 146) that "the relationship of military personnel to the Government has been governed exclusively by federal law," the Court held that Congress intended this federal system of compensation to exclude the remedy under the Act, based as the latter is on the law of the place where the tort is committed.[16]

That these considerations provided the principal basis for the decision appears from *Dalehite* v. *United States*, 346 U. S. 15, 31, n. 25, which summarized the holding in *Feres* as follows:

> "The existence of a uniform compensation system for injuries to those belonging to the armed services led us to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law."

To the same effect, *Johansen* v. *United States*, 343 U. S. 427, 440.

This ground for the result reached in *Feres* cannot support the exclusion of prisoner-claims from the coverage of the Act.

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[16] The opinion (at 142-143) found support for this view in the fact that, under the Act, the claim of a serviceman who may not move about at will, would be governed by the law of a place in which he had not elected to be.

In the first place, Congress has not provided administrative compensation for injuries to prisoners which bears any resemblance to the system for servicemen. The government (Br. 14-17) makes much of the scheme authorized by 18 U. S. C. 4126. But this scheme has none of the characteristics emphasized in *Feres*. It is not "comprehensive" since it provides no coverage whatsoever for injuries which, like Winston's, are not sustained as an incident to work in prison industry or maintenance.[17] It is not "certain and uniform" since a decision as to whether there shall be a scheme and, if so, its terms, as well as the amount of each award are all discretionary with Federal Prison Industries, Inc., which must provide the financing out of its own funds. Furthermore, the compensation which the scheme provides is "niggardly" at best. Regulations issued under section 4126 state that no compensation will be awarded "if full recovery occurs while the injured is in custody and no significant disability remains after release." Moreover, the *maximum* compensation which may be awarded on release is that provided in the Federal Employees' Compensation Act, 5 U. S. C. 751, *et seq.*, calculated on the basis of the *minimum wage* prescribed by the Fair Labor Standards Act, 29 U. S. C. 206. Department of Justice, Inmate Accident Compensation Regulations, Revised September 26, 1961, sections 11 and 13.[18]

Second, the basis for the decision in *Feres* here under discussion has been weakened if not overruled by *United*

[17] At the time of the passage of the Act, the coverage of section 4126 was limited to injuries incurred in prison industry where only one-third of the prison population is employed. 63 Yale L. Jour., 418, 424 (Note). The 1961 amendment extends coverage to injuries incurred as an incident to maintenance wo[illegible]

[18] Furthermore, under the Regulations, payme[illegible] more in the nature of a reward for good behavior than [illegible]ensation for loss of earnings. For section 16 provides that p[illegible]ments "shall be immediately suspended upon conviction of any crime, or upon incarceration in any jail, correctional, or penal institution."

States v. *Brown*, 348 U. S. 110. The Court there held (at 113) that the existence of the comprehensive compensation system for servicemen does not preclude recovery under the Act for negligence in the treatment of service-connected disabilities of discharged veterans.

Finally, it is significant that *Goldstein* v. *New York*, 281 N. Y. 396 (1939), decided seven years prior to the Act, held that state militiamen are excluded from coverage under the New York Court of Claims Act.[19] The decision was based on the ground that the legislature, having provided a comprehensive system of compensation for militiamen, could not have intended to permit them to recover under the Court of Claims Act.[20] For the reasons stated earlier, the presumption is that Congress was aware of and intended to adopt this construction of the New York statute when it passed the Act. The legislative history, therefore, supports the result in *Feres* just as it supports a contrary result in the present case. See *supra*, pp. 14-15.

2. The second ground for the *Feres* decision was stated by the Court (at 142) as follows:

> "We find no parallel liability before, and we think no new one was created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

The conclusion that no parallel liability existed prior to the Act was based on the Court's findings (at 141, 142) that there is "no American law which ever permitted a soldier to recover for negligence, against either his superior officers

[19] The case is cited in *Feres*, at 142.

[20] The Court of Claims Act was amended in 1953 by adding a provision (§ 8a) which waives the state's immunity from tort liability to militiamen "except while engaged in the active service of the state."

or the Government he is serving," and that no state "has permitted members of its militia to maintain tort actions for injuries suffered in the service."

This ground for the result in *Feres* has no application to the present case for two reasons.

First, there is ample evidence here of the "parallel liability" found wanting in *Feres*. For prisoners, unlike soldiers, have frequently been permitted to recover for negligence in suits against governmental bodies or jailers.

Four states have statutes waiving immunity from tort liability in substantially the terms employed in the Act. In the three states where claims for prison-incurred injuries have been presented under these statutes, recovery has been allowed.[21] As we have seen (*supra*, pp. 15, 17), this is true of New York[22] and Illinois. It is likewise true of North Carolina under its General Statutes § 143-291, enacted in 1951. *Lawson* v. *Highway Commission*, 248 N. C. 276, 103 S. E. 2d 366; *Levy* v. *Prison Department*, 252 N.C. 615, 114 S.E. 2d 812; *Gould* v. *Highway Commission*, 245 N.C. 350, 95 S.E. 2d 910.[23]

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[21] The government is in error in stating (Br. 17, n. 9, 35-36) that New York is the only state that allows prisoner suits against the state itself.

[22] For New York prisoner cases subsequent to the date of the Act, see e.g., *Scarnato* v. *State*, 298 N. Y. 376, 83 N. E. 2d 841; *McCrossen* v. *State*, 101 N. Y. Supp. 2d 591; *Piscano* v. *State*, 188 N. Y. Supp. 2d 35.

[23] The fourth state is Washington where there are as yet no reported decisions under the recent state statute, Session Laws, 1961, Chap. 136. A fifth state, Alabama, has established a quasi-judicial Board of Adjustment with authority, among other things, to award damages "for personal injury to or death of any convict," under circumstances "where in law, justice or good morals the same should be paid." 55 Alabama Code §§ 334, 344.

Elsewhere, governmental bodies have been held liable for injuries to prisoners in the absence of statutes waiving immunity.[24] Thus, it was in a decision allowing the tort claim of a prisoner that the Supreme Court of Florida announced the judicial abrogation of the immunity doctrine as applied to municipal corporations. *Hargrove* v. *Cocoa Beach*, 96 So. 2d 130. And see *Lewis* v. *Miami*, 127 Fla. 426, 173 So. 150; *Moffit* v. *Asheville*, 103 N.C. 237, 9 S.E. 695; *Shields* v. *Durham*, 118 N.C. 450, 24 S.E. 794; *Lewis* v. *Raleigh*, 77 N.C. 229;[24] *Edwards* v. *Pocahontas*, 47 F. 268 (C.C. W.D. Va.); *Turner* v. *Peerless Ins. Co.*, 110 So. 2d 807 (La.). See also McQuillan, Municipal Corporations (3rd ed.) § 53.94, which speaks of the "manifest injustice of the rule" in jurisdictions which deny recovery.

Furthermore, most jurisdictions permit prisoners to recover in actions against the jailers themselves. As we have noted (*supra*, p. 11) this is the case in Indiana. The decisions in other jursdictions are collected in 14 A.L.R. 2d 353, Annotation.[25] And see also, Woody, Recovery by Federal Prisoners under the Federal Tort Claims Act, 36 Wash. L. Rev. 338, 353, n. 83.

Thus, there is ample precedent for allowing recovery on tort claims for injuries to prisoners. A construction of the Act to include such claims is consonant with these precedents. Unlike the situation in *Feres*, this construction does not involve "a radical departure from established law"

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[24] The North Carolina decisions ante-date the state's tort claims act and turn on a statute which, like 18 U. S. C. 4042, imposes a duty of care on the bodies that operate prisons.

[25] A. L. R. cites two federal cases allowing recovery in suits by state prisoners. *Bracken* v. *Cato*, 54 F. 2d 457, and *Indiana ex rel. Tyler* v. *Gobin*, *supra*. *Steele* v. *Halligan*, 329 F. 2d 11 is to the same effect. *Gollub* v. *Krimsky*, 185 F. Supp. 783, decided by the same judge who dismissed the Winston complaint, denied recovery in a case involving a federal prisoner. But cf. *Hill* v. *Gentry*, 280 F. 2d 88.

which the Court held (at 146) should not be imputed to Congress.

Feres is therefore inapplicable on the facts. Furthermore, its holding that recovery under the Act is dependent on the existence of parallel private or governmental liability appears to have been overruled by *Indian Towing Co. v. United States* and *Rayonier, Inc. v. United States*, both *supra*.[28] These cases hold that the fact that a liability is novel and unprecedented is not a ground for its exclusion from the coverage of the Act. On the contrary, as *Rayonier* states (at 319), "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

We have shown that neither of the reasons assigned by the opinion in *Feres* for denying recovery under the Act to servicemen is applicable to prisoners. Even as to servicemen, the Court has confined the ruling in *Feres* to the facts of that case. See *United States v. Brown, supra*. And the decisions cited by the government (Br. 10-11, n. 1) denying recovery to prisoners on the authority of *Feres* have been criticized by the author of the text book on the Act and by every law review which has commented on the subject. Wright, The Federal Tort Claims Act (1957), pp. 28-30 and Supp. (1959), pp. 28-31; Woody, Recovery by Federal Prisoners under the Federal Tort Claims Act, 36 Wash. L. Rev. 538; 63 Yale L. Jour. 418 (Note); 8 Okla. L. Rev. 114 (Note); 29 N.Y. Univ. L. Rev. 224 (Note); 28 N.A.C.C.A. Jour. 63 (Comment). For law review comment on the decision below, see Notes in: 76 Har. L. Rev. 413; 63 Col. L. Rev. 144; 110 U. Pa. L. Rev. 1048; 51 Geo. L. Jour. 195; 39 Univ. Det. L. Jour. 761; 8 N.Y.L. Forum 516.

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[28] This was the view of the majority below. R. 30, n. 6, 31, n. 7. And see also *Lawrence v. United States*, 193 F. Supp. 243, 245.

III. The policy considerations advanced by the government are without substance and, in any event, cannot alter the construction of the Act established by its text and the legislative history.

The government devotes the bulk of its brief (pp. 19-41) to describing the undesirable consequences which its authors foresee from a decision that claims for prison-incurred injuries are within the coverage of the Act. As will be shown, the description is highly exaggerated, largely imaginary, and contrary to all of the relevant experience. It should be noted at the outset, however, that the burden of overcoming the terms of a statute by what are thought to be the consequences of a literal interpretation is a heavy one. It is only in "rare and exceptional circumstances" that the literal meaning of a statute will be disregarded, even when it seems to lead to an absurd result. "The absurdity must be so gross as to shock the general moral or common sense * * *. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks* v. *Harrelson*, 282 U. S. 55, 60.

The government bears an even heavier burden in the present case because its judgment as to the wisdom of allowing recovery on prisoner claims is contrary to the judgment expressed by Congress when it passed the Act. Thus, the House and Senate Reports stated (*supra*, p. 12) that those governmental activities which Congress believed should be free from damage suits are the ones excepted from coverage in section 2680. Moreover, the House Report contains a finding (*supra*, pp. 14-15) that the New York statute, under which prisoners had been permitted to recover, "does not appear to have had any detrimental or undesirable effect." The intent of Congress that the letter of the statute is to prevail—at least in the case of prisoner claims—could hardly be plainer.

The government, however, asserts (Br. 19, 28, 37) that the decision in *Feres* was based on the extreme results

which would obtain from allowing recovery on claims for negligence occurring in the course of active military duty. It argues that the allowance of prisoner-claims would cause similar results.

It may well be that implicit in the decision in *Feres* was the Court's belief that the consequences of allowing the claims of servicemen were so "outlandish" that they could not have been intended by Congress. *Brooks* v. *United States*, 337 U. S. 49, 53. *United States* v. *Brown*, 348 U. S. 110, 112.[27] But no such consequences will result from the allowance of prisoner-claims. For the functions of the Bureau of Prisons and its relationship to prisoners are entirely different from the functions of the defense establishment and its relationship to the members of the armed forces on active duty.

The differences are highlighted by 18 U. S. C. 4042 which charges the Bureau of Prisons with the safekeeping, care and protection of prisoners. It is hardly conceivable that Congress should charge the Department of Defense with such duties. For, of course, the needs of national defense may be and often are incompatible with the safekeeping, care and protection of the armed forces.[28] Yet there is nothing absurd or outlandish about imposing the duties of section 4042 on the Bureau of prisons. How then could Congress have thought it absurd or outlandish to give prisoners a remedy for breaches of the duties it had prescribed?

The differences between the situation of prisoners and that of soldiers is further illustrated by the difference in

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[27] As we have seen (*supra*, p. 22) there is also support for the result in *Feres* in the fact that, prior to the Act, New York had construed its Court of Claims Act to exclude state militiamen.

[28] The unique character of the relationship of a serviceman to his superiors and the unique requirements of military discipline are evidenced by the fact that members of the armed forces on active duty are subject to the exclusive jurisdiction of military courts where they are governed by military law.

the judicial treatment of their claims for negligence (*supra*, pp. 22-24). In view of the imposing body of law which favors recovery by prisoners, it cannot be seriously argued that allowance of their claims under the Act would be outlandish.

Turning to the dire results which the government supposes will flow from a ruling in favor of prisoner-claims, these appear on examination to lack any substance.

A. "Judicial supervision" and discipline.

It is argued (Br. 28-41) that to subject prison administration to the judicial scrutiny involved in adjudicating the tort claims of prisoners would pose an extreme threat to the maintenance of discipline and jeopardize the success of any modern penal system. The argument is based on nothing but supposition. Yet there is no dearth of relevant practical experience on which to draw.

For many years, most jurisdictions have allowed recovery for prison-incurred injuries in suits against jailers (*supra*, p. 24). And recovery for such injuries from the state itself has been authorized in New York for the last thirty-four years, in Illinois for the last eighteen years, and in North Carolina for the last twelve years (*supra*, pp. 14-15, 17, 23). If these practices had led to the consequenses which the government forecasts, news of the fact could not have escaped the attention of the Bureau of Prisons and its veteran Director. The government, however, cannot cite a single example from life to document the fears which it professes. On the contrary, it states (Br. 36, n. 28) that its research has disclosed nothing about Illinois practice with respect to prisoner-claims, and it appears to be entirely unaware of the practice in North Carolina. Thus it is obvious that a situation which, it is urged, would create havoc in any prison system has not caused even a ripple in penological circles during all the years that it has pre-

vailed on a state level.[29] Moreover, the government's observation (Br. 17, n. 19) that most New York prisoner-claims are for work-related injuries belies its prediction (Br. 39-41) that the allowance of prisoner-claims under the Act will lead to widespread abuses.

The government asserts (Br. 29) that prisoner-claims should be excluded from the Act because the problems of prison administration are "of unparalleled magnitude and complexity," and should therefore be exempt from judicial scrutiny. But it is difficult to see how these problems are significantly different from those encountered by private hospitals for mental disease, drug addiction or alcoholism. Recognition is given to the special character of such problems in formulating the applicable standards of care. But the existence of the problems has never been held to exempt the institutions from accountability for their negligence. See, *e. g.*, *Fowler* v. *Norways Sanatorium*, *supra*, and Annotation, 70 A. L. R. 2d 347. Similarly, claims have been allowed under the Act for injuries to mental patients in government hospitals. *United States* v. *Gray*, 199 F. 2d 239; *Fair* v. *United States*, 234 F. 2d 288; *Fahey* v. *United States*, 219 F. 2d 445. And in *Panella* v. *United States*, 216 F. 2d 622, and *Berman* v. *United States*, 170 F. Supp. 107, it appears to have been conceded that the Act covers the Public Health Service Hospital for narcotic ad-

[29] The government suggests (Br. 35-36) that the situation is ameliorated in New York by that state's civil death statute which suspends the institution of suit until the prisoner's release. Illinois, however, has no civil death statute, and a prisoner may prosecute his claim while incarcerated. *Moore* v. *State*, *supra*. There appears to be no statutory impediment to suit by a prisoner in North Carolina either. But since all of the reported cases involved the death of the prisoner, there is no judicial decision on the subject. As we have noted, *supra*, p. 13, one of the bills which anteceded the Act adopted the New York approach by suspending suits for prison-incurred injuries during the period of incarceration. This approach was abandoned in later bills.

dicts at Lexington, Kentucky in its relations with patients who are not also prisoners.

The government argues (p. 30) that, "the conditions of penal confinement, subject to the requirements of the legislature and the Constitution, are the exclusive responsibility of those designated by Congress to administer the prison system." This begs the question which is whether Congress, in passing the Act, did not impose one of the "requirements" referred to. And the federal courts have reviewed aspects of prison administration where the Congress' grant of authority to do so was not nearly so precise as it in the Act. *Sewell* v. *Pegelow*, 291 F. 2d 196; *Pierce* v. *Vallee*, 293 F. 2d 233; *Coffin* v. *Reichard*, 143 F. 2d 443; *Johnson* v. *Dye*, 175 F. 2d 250, rev'd on other grnds., 338 U. S. 864.

It may well be, as the government suggests (Br. 33), that there is a higher incidence of malingering in prisons than in the general population and that prisoners may sometimes feign illness for nefarious purposes. It therefore makes for ease and "uniformity" of administration to write off all habituees of the prison sick-line as malingerers in the expectation that, if their complaints have a physical basis, nature and a dose of salts will probably work a cure. This was doubtless why Winston was given dramamine for his unsteadiness of gait and periodic loss of vision instead of the timely examination and surgery which would have saved his eyes (R. 2-3). Far from impairing discipline, affirmance of the decision below may well improve it by administering a healthy corrective to such attitudes.

On the other hand, as the court below pointed out (R. 36), the good sense of district judges, who sit in these cases without a jury, the Act's as yet unexplored exemption for

the performance of "a discretionary function,"[30] and its further exemption of certain intentional torts give assurance against any unwarranted judicial interference with the administration of federal prisons.

B. Uniformity.

The government argues (p. 24) that "to allow prisoners to press claims under the Tort Claims Act for injuries incident to their confinement in [the prison] system would undermine both its uniformity and its federal character." This, it is said (*ibid*), is because the Act makes the law of the state where the alleged negligence occurred determinative of liability.

It could be said with as much cogency and for the same reason that to permit veterans to press claims under the Act for injuries incident to their confinement in Veterans' Administration facilities would undermine the uniformity and federal character of the Veterans' Administration. Yet, no such consideration has barred recovery by veterans, and this even though Congress has provided a uniform and adequate alternative system of compensation. *United States* v. *Brown*, *supra*.

It is true that the provision of the Act under which liability is governed by state-law standards of care may cause a certain amount of diversity in the adjudication of the claims of prisoners.[31] But this is the case with all

[30] 28 U. S. C. 2680(a). The House Report, pp. 5-6, gives examples of what this provision was intended to accomplish.

[31] But the diversity will not be as great as the government anticipates. Contrary to its contention (Br. 35, n. 27), liability under the Act does not depend on the existence of a parallel liability by jailers under state law. See *supra*, pp. 10-11. The general principles of substantive tort law and standards of care which determine liability under the Act do not differ greatly from state to state. And there is no reason to believe that federal courts will give state standards the mechanical application which the government (Br. 24-25) seems to fear.

claims under the Act as the result of Congress' deliberate decision to make the state laws controlling. Moreover, lack of uniformity from state to state in the operations of an agency of the national government is inevitable under our federal system.[32] As the Court stated in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 153-154:

> "Simplicity of administration is a merit that does not adhere in a federal system of government, as it is claimed to do in a unitary system * * *. At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government."

The government (Br. 27) alludes to the observation in *Feres* (at 143) that it makes no sense to have the tort claim of a soldier governed by the law of a place where he never elected to be, and argues that the same observation is pertinent to the claims of prisoners. But the statement in *Feres* was made in support of a holding that the uniform system of compensation provided for servicemen excluded a remedy under the Act. There being no such system for prisoners, they obviously should not be left remediless because the only available remedy is thought to be deficient in making their claims dependent on the laws of places where they never elected to live.

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[32] This is true, as the court below observed (R. 32), of the Bureau of Prisons under 18 U. S. C. 4082 which permits the confinement of federal prisoners in state penal institutions. Even today, ten per cent of all federal prisoners are so confined (G. Br. 24).

Conclusion

The government's brief is an attempt to persuade the Court to write an exception into the Act, contrary to its language and legislative history. But as stated in *Rayonier, Inc.* v. *United States*, *supra*, at 320:

> "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

The argument of the government also contravenes the principle stated by Cardozo, J., in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30, quoted with approval in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383:

> "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been given."

It is anomalous that the government should argue for a judge-made exemption from the coverage of the Act at a time when judicial impatience with the doctrine of sovereign immunity has led to its abrogation by judicial decision in state after state—and without excepting the claims of prisoners or anyone else. *Muskopf* v. *Corning Hospital District*, 55 Cal. 2d 211, 359 P. 2d 457; *Holytz* v. *Milwaukee*, 17 Wis. 2d 26; 115 N. W. 2d 618; *Williams* v. *Detroit*, 364 Mich. 231, 111 N. W. 2d 1; *Molitor* v. *Kaneland District No. 302*, 18 Ill. 2d 11, 163 N. E. 2d 89; *Hargrove* v. *Cocoa Beach*, *supra*.

The judgment below in *Winston* v. *United States* should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes Involved

1. The Federal Tort Claims Act, as amended, 28 U.S.C. 1346 and 28 U.S.C. 2674 *et seq.* provide in pertinent part as follows:

§ 1346. United states as defendant

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

"§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency

or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(h)* Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

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* Subsection (g) was repealed in 1950, 64 Stat. 1043.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

2. 18 U.S.C. 4005 and 4042 provide in pertinent part as follows:

§ 4005. Medical relief; expenses

(a) Upon request of the Attorney General, the Federal Security Administrator shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons, and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions. * * *

§ 4042. Duties of Bureau of Prisons

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

This section shall not apply to military, or naval, penal or correctional institutions or the persons confined therein.